LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 24 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-884

STEPHEN S. CHANDLER,
UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,

Petitioner,
(Plaintiff-Appellee, Court Below)

v.

WILLIAM H. PAT O'BRYAN,

Respondent,
(Defendant-Appellant, Court Below)

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

CARL L. SHIPLEY
1108 National Press Building
Washington, D.C. 20004
Counsel for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

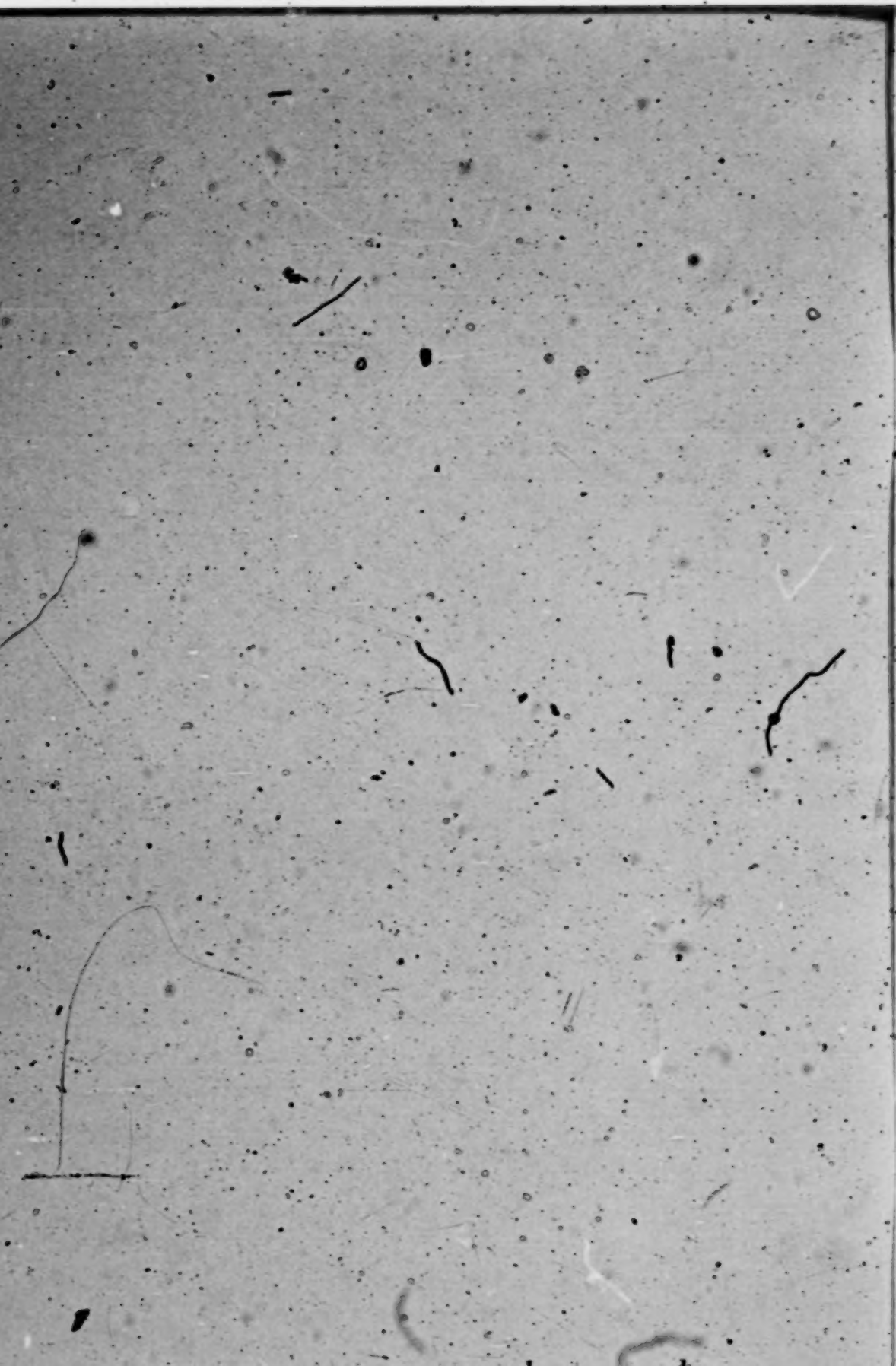

TABLE OF CONTENTS

	Page
New Questions Presented	2
Reasons for Granting the Writ	3
Statement of the Case as Now Posed	4
There Is no State Court Judgment Against Judge Chandler	10
Removal	12
Respondent Cites No Authority That Supports His position	13
Conclusion	

TABLE OF CITATIONS

Cases:

Chandler v. O'Bryan, 445 F.2d 1045, 1047-1051	4
1050-1051	9
1051, 1056	9, 10
1057	7, 15
Maryland Casualty Company v. Pacific Coal & Oil Company, 312 U.S. 270, 85 L.Ed. 826, 61 S.Ct. 510 (1941)	7
O'Bryan v. Chandler, 399 F.2d 916, Appendix Q-1 to Q-3 and Q-4 to Q-6 to Petition for Certiorari	8
O'Bryan v. Chandler, Original mandamus action No. 7400, C.A. 10, Appendix L to Petition for Certiorari	8
O'Bryan v. Chandler, 388 U.S. 904, 18 L.Ed.2d 1377, 87 S.Ct. 2131	11
O'Bryan v. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, No. 1011, Oct. Term 1968, cert. den. 394 U.S. 906, 22 L.Ed.2d 217, 89 S.Ct. 1014; Pet. for Reh. den. April 21, 1969, 394 U.S. 994, 22 L.Ed.2d 772, 89 S.Ct. 1456 (App. Q to Petition for Certiorari, p. 6)	8
O'Bryan v. Chandler, 352 F.2d 987, cert. den. 38 U.S. 926, Appendix N to Petition for Certiorari	14

Platt v. Minnesota Mining & Manufacturing Company, 376 U.S. 240 16

Poss v. Lieberman, 187 F.Supp. 841, 299 F.2d 358, cert. den. 371 U.S. 944, 8 L.Ed.2d 810, 82 S.Ct. 1586 16

Public Service Commission v. Wycoff Co., 844 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952) 13

Sears, Roebuck v. Zurich, 422 F.2d 587, C.A. 7, 1970 7

United States District Court and Honorable Jesse W. Curtis v. Court of Appeals for the Ninth Circuit, Rozalio U. Munoz and Michael E. Tigar, 339 F.2d 1176, 344 F.2d 434 (C.A. 9, 1971) 15

United States Statutes:

Rule 57 F.R.C.P. 13

28 U.S.C. 1292(a)(1) 11
28 U.S.C. 1331(a) 13
28 U.S.C. 1441 16
28 U.S.C. 1442-1446 2
28 U.S.C. 1442 11
28 U.S.C. 1442(a)(1) 16
28 U.S.C. 1446(b) 11
28 U.S.C. 1446 (e) 11
28 U.S.C. 2283 14

Miscellaneous:

Appendix A to Petition for Certiorari:

pp. A-7 to A-10 15
p. A-11 (p. 1055) 13
p. A-13 15
p. A-14 ..... 14, 15

Appendix E-1 thru E-7 to Petition for Certiorari 12, 13

Appendix J to Petition for Certiorari 9, 12

Appendix N to Petition for Certiorari 9

Appendix S-2 to Petition for Certiorari 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-884

STEPHEN S. CHANDLER,
UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,

Petitioner,
(Plaintiff-Appellee, Court Below)

v.

WILLIAM H. PAT O'BRYAN,

Respondent,
(Defendant-Appellant, Court Below)

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

The Petitioner respectfully moves the Court for an order vacating its denial of the Petition for Writ of Certiorari, entered on February 28, 1972, and for an order granting the Petition. As grounds therefor Petitioner states:

Petitioner limited his presentation in the Petition for Certiorari to the error of the Court of Appeals in holding that

the trial court lacked jurisdiction to enter the Declaratory Judgment of judicial immunity upon which ground the Court of Appeals based its reversal of the trial court.

This Petition for Rehearing is limited to completely new substantial and controlling grounds available to Petitioner although not previously presented which were injected into the case by the Response to the Petition. Unfortunately Petitioner with due diligence was unable to complete and file a reply to the Response prior to the entry of the order denying certiorari.

In view of the surprising nature of the irresponsive and irresponsible position taken by counsel for Respondent in the Response and their deliberate reassertion of and reliance upon incorrect material facts and the legal conclusions on irrelevant points of law discussed by the Court of Appeals, the filing of a reply thereto was absolutely necessary if the Court was not going to be led into error.

NEW QUESTIONS PRESENTED

The new questions are broader in scope and of even greater public importance than the jurisdictional question presented in the Petition for Certiorari. The new questions raised by the Response are:

1. Does a Federal officer have the *absolute* right to remove a State court libel action to Federal court for adjudication of the question of his judicial immunity from liability upon strict compliance with the Federal removal statutes, 28 U.S.C. §§ 1442-1446?

2. Did the Court of Appeals have jurisdiction in this action to order the trial court by "precatory" suggestions to remand to State court a related case pending before the trial judge which had been removed to Federal court by a Federal judge who had strictly complied with the applicable Federal removal statutes and thus has the *absolute* right to have the question of his judicial immunity adjudicated on the merits by the Federal trial court?

3. Do such "precatory" directions usurp the jurisdiction of the trial judge in the performance of a discretionary function?

4. Did the pendency of a State court action involving some of the same questions defeat the jurisdiction of the trial court to enter the Declaratory Judgment of judicial immunity in the instant case where no State law nor Federal-State conflict is involved?

5. Should the Petition for Rehearing be denied because the Court of Appeals, misled by Respondent, based its decision on irrelevant erroneous facts which were relied on by this Court, or should the Court, however seemingly incredible, accept Petitioner's statement as to the *relevant record facts* which are fully substantiated by the Appendix to the Petition for Certiorari?

6. Should the Court question the propriety of the *reassertion by counsel* in the Response of patently incorrect and misleading statements of fact contained in the Opinion of the Court of Appeals which may have and probably did mislead this Court? What ethical duty does counsel owe to the Court under such circumstances?

REASONS FOR GRANTING THE WRIT

These new questions furnish important additional grounds for the granting of the Writ because of their general public importance. The conclusions of the Court of Appeals on important points of Federal law appear to be directly contrary to the relevant decisions of this Court and are in direct conflict with the relevant decisions of the Courts of Appeals of all other circuits on the same matters.

The actions of Respondent and his counsel strike at the heart of our legal system at a time when law and order and the orderly dispatch of justice are being ruthlessly attacked from all sides and especially by disruptive conduct of counsel.

There is no difference in principle in disruptive conduct in the courtroom and the harassment of a judge for his official acts by the prosecution of *groundless defamatory litigation* against him in order to obtain wide defamatory dissemination by the news media, knowing that they are sheltered by the shield of professional privilege which furnishes them immunity from personal liability. Both types of misconduct breed contempt for all courts and all judges as well as the Constitution and the laws of the Country. And it is of primary importance that a few members of the bar should not be permitted to misuse and abuse the processes of the courts in their efforts to disrupt and destroy them.

STATEMENT OF THE CASE AS NOW POSED

Petitioner will not enter into a lengthy discussion of the inaccurate facts and irrelevant points of law contained in the Opinion of the Court of Appeals and reasserted and relied on by counsel in the Response. Of necessity, a few of the erroneous facts must be pointed out and corrected to demonstrate that the Court of Appeals based its reversal of the trial court on facts which are wholly different from those found by the trial court and indisputably disclosed by the record before this Court.

The facts primarily relied on by the Court of Appeals in reaching its conclusions are not supported by the record which is made up almost entirely of court records of matters long *res judicata*. The record shows clearly that all pertinent relevant facts were undeniable record facts.

At the outset counsel for Respondent state on page 1 of the Response that

> "Respondent incorporates as his statement of the case, the painstaking, exhaustive statement of the facts set out in the opinion of the Court of Appeals, 445 F.2d 1045, at pp. 1047-1051. The Court of Appeals sets out the complete history and factual background necessary to the understanding of the legal issues involved. *Petitioner's statement is not factual,* is

> self-serving and fails to state the background necessary to an understanding of the case." (Emphasis supplied.)

This surprising statement by counsel and on page 2 of the Response their direct challenge to Petitioner that if he could point out any irrelevancy, inaccuracy or gratuitous statements of the Court of Appeals it was his duty to do so, makes it necessary for Petitioner to point out at least some of the inaccurate statements of fact and the irrelevancy of some of the matters discussed at length by Judge Gibson and the inapplicable legal conclusions drawn therefrom, an arduous and time-consuming task. It would take many times the 45 pages used by the Court of Appeals to point to all of them and detail the correct facts shown by the record. Total silence under the circumstances would lend the impression that there was at least *some* factual basis for the action of the Court of Appeals in reversing the trial court.

Counsel realizes that such a complete departure by a Court of Appeals from the pertinent record before it is so unusual as to cast doubt on his categorical statement that certain important facts were erroneous and certain conclusions of law completely irrelevant; that his categorical statement standing alone would seem almost unbelievable to the Court and burdens him with the professional duty to either withdraw it or prove it beyond any question of doubt. For this reason counsel for Petitioner reluctantly departs from his original resolution not to obscure the real issues by such an attempt and as briefly as possible makes the following statements verified by a careful perusal of the voluminous court records in the series of Mr. O'Bryan's retributory litigation against Judge Chandler which point up some of the more important factual errors detailed by the Court of Appeals in the hope that this Court will look askance at the *entire* 45 page Opinion which goes behind the facts finally adjudicated by other courts, weighs the evidence and finds its own interesting facts long ago *res judicata* to the contrary, which findings cast doubt upon the verity of the former decisions and appear to make a martyr of Mr.

O'Bryan, a disbarred lawyer who has ruthlessly defamed Judge Chandler and inflicted upon him the burden of defending the groundless litigation listed on 17 pages of Appendix U to the Petition, the same Mr. O'Bryan who many years after his disbarment by the Oklahoma Supreme Court recently made application for readmission to the Bar of the State of Oklahoma and to whom, after a public hearing, at which, by agreement, because of the pendency of this litigation, no evidence was offered of his defamatory harassment of Judge Chandler for so many years, on January 12, 1971, the Supreme Court of Oklahoma denied readmission to the Oklahoma Bar for other ethical misconduct upon the stated ground that he *"does not possess the moral qualifications required for admission to practice law in the State of Oklahoma"* and found *"that his resumption of the practice of law in Oklahoma would be detrimental to the integrity and standing of the Bar, the administration of justice and the public interest"*, APPENDIX S-2 to the Petition for Writ of Certiorari. Yet the "background facts" recited in the Opinion of the Court of Appeals actually make it appear that a Federal judge has misused his high office to wrong an innocent lawyer.

But the most surprising thing about the Response which Petitioner regrets the necessity of calling to the attention of the Court, is that counsel for Respondent, as above stated, *reassert* and rely upon the misstatements of fact contained in the Opinion of the Court of Appeals knowing them to be erroneous, when it was their professional duty to this Court to admit that such of the facts as are directly contrary to the facts shown by the record in the case and verified by the contents of the Appendix to the Petition for Certiorari were not true. They knew from actual conduct of the litigation for about seven years that certain of the important facts relied on by the Court of Appeals were false. Their failure to so admit or rather their almost unbelievable reaffirmation of the erroneous facts in the Response may well have led this Court into error, to say the least their conduct

caused this Court to enter the order denying certiorari while undoubtedly assuming the truth of the factual statements of the Court of Appeals which counsel verified by reasserting and relying on in the Response. This is especially true since the court did not have before it a Reply by Petitioner to the misleading Response.

It is also especially significant that although counsel state that "Petitioner's statement is not factual" the Response does not challenge a single statement of fact contained in the Petition for Certiorari which is supported by the Appendix verifying all of the facts relied on in the Petition.

On page 3 the Response does challenge the failure of Petitioner to quote Judge Gibson's irrelevant statement that " 'however even assuming that sufficient jurisdiction had been shown, we think the order must be reversed for the reason that it was an improper interference with the State court's jurisdiction' (445 F.2d at 1057) (emphasis supplied.)" Petitioner now answers it. This erroneous conclusion of the court is contrary to well settled law. The pendency of another action involving some of the same issues (or for that matter all of them) does not preclude a Federal court from determining the question of judicial immunity in a Declaratory Judgment action. See *Maryland Casualty Company v. Pacific Coal & Oil Company*, 312 U.S. 270, 85 L.Ed. 826, 61 S.Ct. 510 (1941), and *Sears, Roebuck v. Zurich*, 422 F.2d 587, C.A. 7, 1970. These cases so hold and at the same time make it clear that it would have been an abuse of discretion for Judge Battisti to have refused to assume jurisdiction and adjudicate the rights of the parties under the circumstances existing here. The court had original jurisdiction, State libel laws are inapplicable, no Federal-State conflict is involved, *a multiplicity of suits would be avoided and the Federal courts have preempted the exclusive right to adjudicate the question of the immunity of Federal officers who assert by verified Petition for Removal that their acts were performed under color of office or in the performance of their duties.*

The third libel action brought by Respondent against Judge Chandler which was removed from State court and is now pending before Judge Battisti is only *one* of the many actions brought by Mr. O'Bryan against Judge Chandler and only one of three actions which were pending against him at the time he filed the Declaratory Judgment action, from each of which pending actions Judge Chandler sought relief in the Declaratory Judgment action.

The other two actions pending at that time were *O'Bryan v. Chandler*, APPENDIX Q-1 to Q-3 and Q-4 to Q-6 to the Petition for Certiorari and *O'Bryan v. Chandler*, Original mandamus action No. 7400 in the Court of Appeals for the Tenth Circuit which Mr. O'Bryan had then recently reopened. These two actions were disposed of more than a year after the institution of this Declaratory Judgment action when the Supreme Court denied the Petition for Certiorari in a case knowingly filed by Mr. O'Bryan and his counsel against Judge Chandler under the wrong title, which made it necessary for Judge Chandler to obtain counsel and defend the action, *O'Bryan v. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma*, No. 1011, October Term 1968, cert. den. 394 U.S. 906, 22 L.Ed.2d 217, 89 S.Ct. 1014; Pet. for Reh. Den. April 21, 1969, 394 U.S. 994, 22 L.Ed.2d 772, 89 S.Ct. 1456 (APPENDIX Q to Petition for Certiorari, page 6).

The relief sought by Declaratory Judgment goes far beyond the relief obtainable by final adjudication of the *three* cases pending at the time it was filed. It encompasses not only those actions but *future* actions which past experience indicates Judge Chandler has every reason to expect will be filed if relief is not granted here. This action also encompasses damages for the series of present and past groundless actions and envisages the power of the Court *sua sponte* to take punitive action.

What Judge Chandler *actually* sought and still seeks and what he obtained in the trial court was *another* judgment of judicial immunity for certain official acts and acts *in relation*

thereto, some of which acts are the basis of Mr. O'Bryan's pending third libel action. Judge Chandler also sought and still seeks enforcement of the judgment of judicial immunity pronounced by Judge Battisti as well as enforcement of the *already existing final judgment* of judicial immunity in the malicious prosecution, libel and slander action (APPENDIX N to the Petition for Certiorari) which not only granted him judicial immunity for the acts there involved but also for the acts involved in the pending libel action, in aid of the jurisdiction of *both* Federal courts and to protect and effectuate both judgments.

As one concrete illustration of the many inaccurate facts stated in the Opinion of the Court of Appeals, Judge Gibson states in the first sentence of the first paragraph of the Opinion that Judge Chandler is a "*Senior* Judge", that he sought to have Mr. O'Bryan enjoined "from enforcing a libel *judgment* for $50,000 obtained in the State courts of Oklahoma against" him and to have "the *judgment* in the State court expunged from the record." (Emphasis supplied.)

Three patent errors of fact are thus embodied in the Opinion at the very outset, two of them positive misstatements of *important* record facts. The nonexistent State court *judgment* twice referred to in the first paragraph was later in the Opinion twice reiterated under the heading "THE FACTS", pp. 1050, 1051, and twice again under the heading "THE LAW" as the specific controlling bases for conclusions of law, pp. 1051, 1056.

The record facts are that a void State court judgment which had been unlawfully entered some months before this action was filed had been ordered expunged by Judge Battisti in the related libel action as having been entered after removal in violation of Federal law, APPENDIX J to Petition for Certiorari, and had been *actually expunged* by the State court.

It cannot be overemphasized that there is no *State court judgment against Judge Chandler.* Yet counsel for Respondent state on page 5 of the Response that Judge Chandler

claims "that the state court erred in deciding that he had no judicial immunity when he committed his libel against Mr. O'Bryan" and argue that "The Federal Trial Court has no original jurisdiction to reverse or modify a state court *judgment*", citing three United States Supreme Court cases and one Fifth Circuit case.

THERE IS NO STATE COURT JUDGMENT AGAINST JUDGE CHANDLER

On page 6 of the Response, it is also asserted that the Declaratory Judgment Act creates no substantive rights and that Judge Chandler is trying "to wipe out and eliminate Mr. O'Bryan's substantive *judgment* that was won on *the merits* in the Oklahoma State Court".

Judge Gibson bases his legal conclusion on page 1056 of the Opinion, APPENDIX A-12, on the false assumption that a State court *judgment* exists. He states:

> "O'Bryan's cause of action is solely based on *state libel laws*, and in no way raises a federal question in and of itself. Judge Chandler's assertion of judicial immunity is 'in reality in the nature of a defense' to that suit. Therefore, it does not confer original federal question jurisdiction in the declaratory judgment action. The application of this principle is particularly apposite in the present case where the state court action is not merely threatened, but *has actually been instituted and carried to judgment.*" (Emphasis supplied.)

The *record* facts regarding this much heralded *judgment* are that *after* the third State court libel action which is still pending became again removable to Federal court on either of two valid grounds, of course assuming that it was not removable when first removed and was not erroneously remanded by Judge Austin:

(1) by reason of the voluntary amendment of the original Petition by counsel for Mr. O'Bryan over Judge

Chandler's objections on February 23, 1967, during the State court trial;

and

(2) by reason of the fact that at the close of the evidence by both parties on February 24, 1967, *all* of the evidence in the case showed that Judge Chandler was at all times acting under color of office and in the performance of his official duties.

Immediately and on February 26, 1967, Judge Chandler again removed the case to Federal court strictly in accordance with Federal removal procedure as specifically authorized by 28 U.S.C. § 1446(b), para 2, and 28 U.S.C. § 1442.

After the case was again pending in Federal court, Mr. O'Bryan and his counsel petitioned this Court for a Writ of Prohibition against Judge Chandler ordering him not to proceed further in Federal court in the removed libel action on the ground that it was illegally removed. Judge Chandler obtained Washington counsel who filed Response thereto. *After* this Court had on June 12, 1967, denied the Petition, 388 U.S. 904, 18 L.Ed.2d 1377, 87 S.Ct. 2131, *thereafter* and on June 30, 1967, in the face of the refusal of this Court to intercede and in defiance of the Federal statutory prohibition contained in 28 U.S.C. § 1446(e), Mr. O'Bryan and his counsel without prior notice to Judge Chandler procured, from the State judge and filed in the libel action in State court, a purported Journal Entry of Judgment against Judge Chandler for $50,000.

When the illegal entry of the judgment was called to his attention, Judge Battisti, on September 25, 1967, entered a mandatory Writ in the removed pending libel case ordering Mr. O'Bryan and the State judge to expunge the judgment as having been entered in violation of the Federal statutory injunction. Respondent and his counsel thereupon acquiesced in the order, took no interlocutory appeal, as authorized by 28 U.S.C. § 1292(a)(1), had the State court comply with the order and actually expunge the void judg-

ment. No punitive order was entered against Respondent and his counsel.

The Writ of Prohibition and Mandamus prohibing the State court and Mr. O'Bryan from proceeding further in said action in State court and ordering that the void judgment be expunged is set out *verbatim* as APPENDIX J to the Petition for Certiorari.

This third State court libel action against Judge Chandler is still pending before Judge Battisti who has stayed action until the final determination of this case which will make decision there unnecessary if his judgment in this case is affirmed.

REMOVAL OF CASES BY FEDERAL OFFICERS

It is important to note that the Response has now broadened the issues to include the question of the right of Federal officers to remove actions to Federal Court.

Respondent and his counsel requested the Court of Appeals in this action to enter a Writ ordering Judge Battisti to remand the pending libel action to the State court although that action was not before the Court for review, or otherwise. They now seek that relief from this Court. The last sentence of the Response states:

> "We urge this Honorable Court to deny this petition and if possible issue orders that put an end to petitioners delaying dilatory tactics in interfering with the Oklahoma State Courts jurisdiction."

It should be noted that Judge Gibson in his discussion of the judgment of the trial court was careful to point out *twice* that he was referring *only* to the *published* opinion of Judge Battisti, APPENDIX E-1 thru E-7, thus ignoring the well-reasoned and convincing *unpublished* opinion of Judge Battisti dated June 12, 1969, detailing the reasoning underlying his Order overruling Respondent's Motion to Dismiss the Declaratory Judgment action and the exercise of his discretion to assume jurisdiction of the action, advance

it on the calendar and give it priority over the disposition of the libel action. The reasoning and the authorities cited to support his action are unanswerable. It is set out verbatim in APPENDIX E-1 to E-7 to Petition for Certiorari.

RESPONDENT CITES NO AUTHORITY THAT SUPPORTS HIS POSITION

The cases cited in the Response to support Respondent's position hold that the Declaratory Judgment Act is procedural only, that it enlarged the range of remedies available in the Federal courts but did not extend their jurisdiction. Petitioner does not rely on the Declaratory Judgment Act for jurisdiction. He relies on the Declaratory Judgment Act as authority for the form of the action *only*.

Petitioner relies on 28 U.S.C. § 1331(a) as conferring *jurisdiction* on the court to entertain the action and adjudicate the Federal question of judicial immunity which is the gravamen of the action.

In this connection the Court of Appeals stated:

> "It is true that the immunity issue is a federal question * * * *but it is in the nature of a federal defense to a suit instituted under state law. As such,* it is not sufficient to convey original jurisdiction on a federal court. (Emphasis supplied)" Opinion, page 1055, APPENDIX A-11.

Judge Gibson cites as authority for his statement and quotes at length from *Public Service Commission v. Wycoff Co.*, 844 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). Had he also quoted the first sentence of the next paragraph it would be clear that the Court in *Wycoff* did not so hold and we find no other case from this Court so holding.

Petitioner relies on Rule 57 F.R.C.P. for the grant of authority to the trial court to advance the action on the calendar and give it priority over the pending libel action. A determination of the libel action would not give Petitioner the complete relief afforded by the Declaratory Judgment

action. If allowed to stand the Declaratory Judgment terminates the libel action as well as the long-existing controversy.

Petitioner relies on the exceptions contained in *28 U.S.C. § 2283* as evidencing the power of the court to enjoin the State court in aid of *its* jurisdiction and to protect and effectuate *its* judgment and *the earlier judgment* of the Court of Appeals decreeing judicial immunity for the acts involved there, *O'Bryan v. Chandler*, 352 F.2d 987, *APPENDIX N* to Petition for Certiorari, and, of course, prior and future acts *in relation thereto*.

Petitioner now joins in Respondent's request that this Court determine the question of the legality of the removal of the pending libel action to Federal court which is within the jurisdiction of this Court by reason of its potential appellate jurisdiction. This would relieve the trial judge of the possible embarrassment of refusing to follow the gratuitous "precatory" directive of the Court of Appeals that he remand that case to State court.

It is of signal importance to note that while the Court of Appeals did not enter the Writ requested by Respondent, it, nevertheless, stated in the Opinion:

> "Appellant O'Bryan, in addition to urging reversal of the judgment in the declaratory judgment action, requests us to enter an order requiring remand of the second removal of the libel suit to the State court. Since this matter is still pending in the trial court and has not been finally acted upon, we do not feel that we have jurisdiction to grant this relief. *We assume* that any further action taken in this matter *will be in conformity with the views expressed in this opinion.*" (App. A to Pet. for Cert. at p. 14).

The suggestive language of the last sentence refers to the discussion in the Opinion of the irrelevant question of the legal effect of the remand by Judge Austin of Chicago, assigned, of the libel case when first removed; the effect

of that remand as making the question of judicial immunity *res judicata*, the removability of the case in the first instance, and the legality of the second removal, pages 1061 to 1064 and pages 1057 and 1058 of the Opinion, APPENDIX A to the Petition, A-7 to A-10, A-13 and A-14. None of these questions were properly before the Court of Appeals and were, therefore, not briefed by Petitioner since they were totally irrelevant to the issues in the Declaratory Judgment action.

Such attempts to control the discretionary decisions of trial judges at the trial level are clearly illustrated by the case of *United States District Court and Honorable Jesse W. Curtis v. Court of Appeals for the Ninth Circuit, Rozalio U. Munoz and Michael E. Tigar*, 339 F.2d 1176; 344 F.2d 434 (C.A. 9, 1971), where similar "precatory" language was held by the Ninth Circuit Court of Appeals to Constitute a mandatory Writ giving positive directions to the trial court. When the District Judge failed to follow the polite directions of the Court of Appeals, he was, in no supplicatory language, summarily ordered to do so and the mandate was ordered issued *forthwith*. The court stated:

> "This Court did not remand the cause for the purpose of permitting the District Court to reach a construction of the rule at variance with that stated by this Court. The *precatory* language of the opinion about resolving the ambiguity in the applicants' favor apparently led the District Court. [1] into overlooking our *directions*." (Emphasis supplied) 344 F.2d 434, 435.

The decision there involved the exercise of judicial discretion by the trial judge as does Judge Gibson's suggestion here.

In view of the precedent thus established by the Court of Appeals for the Ninth Circuit which apparently for the first time brought to the light of day the practice of some Courts of Appeals to attempt to control the discretionary actions of trial courts, it is possible that the polite language

used by Judge Gibson may be interpreted by Judge Battisti to constitute a "precatory" Writ of Mandamus even though the Court of Appeals did not have jurisdiction to enter such a Writ. *Platt v. Minnesota Mining and Manufacturing Company*, 376 U.S. 240 (1964).

If this Court does not act to prevent it, it is possible that Judge Battisti may proceed to remand the case even though the law is well settled that a Federal officer has the *absolute* right to remove such a case. The cases holding that actions against public officers are removable to Federal court under § 1442(a)(1) *as a matter of right*, as different from cases removed under § 1441 where the removability must appear on the face of the Petition, and that where the fact that the defendant is a Federal officer does not appear from the State court petition, the affidavit of the public official in the Petition for Removal furnishes that element, are legion. See *Poss v. Lieberman*, 187 F.Supp. 841, 299 F.2d 358, cert. den. 371 U.S. 944, 8 L.Ed.2d 810, 82 S.Ct. 1586.

This question is no longer just lurking in the background. The Response has made it a vital issue here which can no longer remain unanswered on the ground that it is irrelevant.

This issue alone is of such importance to the public and the judiciary as a whole as to call for the granting of the Writ and the review of this additional compelling issue.

Counsel feels certain that the Court of Appeals did not understand the true facts disclosed by the voluminous record. He feels doubly sure that this Court, relying on the confusing opinion of the Court of Appeals and the irresponsible affirmation of the erroneous facts in the Response filed by counsel for Mr. O'Bryan, did not understand the pertinent facts.

All of the points of law actually involved are indisputably well settled. That the trial court had jurisdiction of the action, this Court and the courts of all circuits are in full accord. Neither sound reasoning, nor any statute or rule of law, nor any adjudicated case supports the judg-

ment of the Court of Appeals. The well-settled case law of this Court and of all circuits supports the judgment of the trial court. For this reason counsel has burdened this paper with the citation of only a few of the available authorities.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the Petition and review the judgment and opinion below. Every good purpose will be served by the granting of the Writ and the summary affirmance of the judgment of the trial court.

CARL L. SHIPLEY

1108 National Press Building
Washington, D.C. 20004

Counsel for Petitioner

March 24, 1972

CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Carl L. Shipley
Counsel for Petitioner